

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR THE CHIEF JUSTICE MARTIN

1932 May 4
All present

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5454

37

LILLIAN CLAWANS, TRADING UNDER THE NAME
OF ADDING & CALCULATING COMPANY, APPEL-
LANT,

vs.

BETTY WAY CARNDUFF.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JULY 22, 1931.

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Court of Appeals of the District of Columbia

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No. 5454

LILLIAN CLAWANS, TRADING UNDER THE NAME
OF ADDING & CALCULATING COMPANY, APPEL-
LANT,

vs.

BETTY WAY CARNDUFF, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5454.

LILLIAN CLAWANS, Trading, etc., Appellant,

vs.

BETTY WAY CARNDUFF.

a Supreme Court of the District of Columbia.

At Law.

No. 69784.

LILLIAN CLAWANS, Trading under the Name of Adding &
Calculating Company, Plaintiff,

vs.

BETTY WAY CARNDUFF, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Declaration.

Filed January 26, 1925.

In the Supreme Court of the District of Columbia.

At Law.

No. 69784.

LILLIAN CLAWANS, Trading under the Name of Adding &
Calculating Company, Plaintiff,

vs.

BETTY WAY CARNDUFF, Defendant.

The plaintiff sues the defendant for that on the 25th day of September, 1924, at the City of Washington, District of

Columbia, the plaintiff loaned to the defendant the sum of Two Thousand (\$2,000.00) Dollars, which defendant promised to repay thirty (30) days from said date; that thereafter and before this action the plaintiff duly demanded payment of same from the defendant, but no part thereof has been paid, and the defendant is now justly indebted therefor to this plaintiff in the sum of Two Thousand (\$2,000.00) Dollars, and the plaintiff claims Two Thousand (\$2,000.00) Dollars, with interest thereon from the 25th day of September, 1924, besides costs.

GEORGE F. CURTIS,
Attorney for Plaintiff, and
 LILLIAN CLAWANS,
In Pro. Per.

114 Market Street, Newark, New Jersey.

2

Particulars of Demand.

Betty Way Vernon, Debtor, to Lillian Clawans, Trading under the Name of Adding & Calculating Company, Creditor.

1924.

Sept. 25. To a loan for 30 days of \$2,000.00

Affidavit of Merit.

* * * * *

CITY OF NEWARK,
County of Essex,
State of New Jersey, ss:

Lillian Clawans, being duly sworn, on oath deposes and says that she is the plaintiff named in the above entitled action, in which Betty Way Vernon is named as defendant; that the affiant, said plaintiff, has a good cause of action against the said defendant in that the plaintiff at the instance and request of the said defendant on or about the 25th day of September 1924 loaned the defendant the sum of Two Thousand (\$2,000.00) on her promise to repay plaintiff the said sum thirty days after said date, that said loan by plaintiff to defendant was made by the plaintiff's check, signed by her by the name under which she traded, namely,

“Adding & Calculating Co., Prop. L. Clawans”, dated Newark, New Jersey, on or about the 25th day of September, 1924, drawn on the Fidelity Union Trust Company of Newark, New Jersey, and made payable to the said Betty Way Vernon or order for the sum of Two Thousand Dollars (\$2,000.00), which check was delivered to the
 3 defendant and cashed by her, that said loan is now long overdue and unpaid as set forth in the Bill of Particulars hereto annexed and made a part hereof, that the plaintiff has repeatedly demanded of the defendant the repayment of the said sum of Two Thousand Dollars (\$2,000.00), that the defendant has failed to repay the same or any part thereof, that there is now due the plaintiff by the defendant the sum of Two Thousand Dollars (\$2,000.00) with interest at 6% thereon from the 25th day of September 1924, and that there are no set offs or just grounds of defense thereto.

LILLIAN CLAWANS.

Subscribed and sworn to before me this 10th day of December 1924.

[NOTARIAL SEAL.]

JOHN Q. FREY,
Notary Public of New Jersey.

My commission expires Nov. 28, 1929, Series C, No. 5014.

Memorandum.

February 17, 1925.—Appearance Whiteford for defendant, motion for security for costs and notice, filed.

Plea of the Defendant.

Filed February 24, 1925.

* * * * *

Comes now the defendant, by her counsel, and for a plea to the declaration filed in the above entitled cause says:

That she did not borrow \$2,000.00 from the plaintiff herein on the 25th day of September, 1924, or at any other time, nor did she ever agree to repay to the plaintiff
 4 herein \$2,000.00 within thirty days after the 25th of September, 1924, or at any other time, and defendant

denies that the plaintiff loaned to the defendant the sum of \$2,000.00 on the 25th day of September, 1924 or at any other time.

ROGER J. WHITEFORD,
Counsel.

Affidavit of Defense.

* * * * *

DISTRICT OF COLUMBIA, ss:

Betty Way Vernon, being first duly sworn according to law, on oath deposes and says that she is the defendant named in the above entitled cause and denies that the plaintiff, Lillian Clawans, has a good cause of action against her, and denies that at the instance and request of the affiant the plaintiff, on or about the 25th day of September, 1924, loaned the affiant the sum of \$2,000.00 on her promise to repay the plaintiff within thirty days after said date; affiant says that she never borrowed any such sum of money from the plaintiff.

Wherefore the defendant denies that she is indebted to the plaintiff in the sum of \$2,000.00, with interest at 6% from the 25th day of September, 1924, or in any other sum.
BETTY WAY VERNON.

Subscribed and sworn to before me this 21st day of February, 1925.

[NOTARIAL SEAL.] NENA HODGES SPENCE,
Notary Public, D. C.

5 *Motion to Substitute Married Name of Defendant.*

Filed November 2, 1925.

* * * * *

Comes now the plaintiff by her attorney and represents to the Court, upon information and belief, that the defendant has married since the last pleading filed herein, wherefore plaintiff moves for an order that defendant discover her present married name and home address, and that leave be granted plaintiff to amend her pleadings by substituting where necessary defendant's said married name.

GEORGE F. CURTIS,
Attorney for Plaintiff.

To Roger J. Whiteford,
Attorney for Defendant:

Please take notice that the above motion will be called to the attention of the court on the 6th day of November 1925, at 10 o'clock a. m., or as soon thereafter as counsel may be heard.

GEORGE F. CURTIS,
Attorney for Plaintiff.

Received a copy of the above motion and notice the 7th day of November, 1925.

ROGER J. WHITEFORD,
Attorney for the Defendant.

6 Supreme Court of the District of Columbia.

Monday, November 9, 1925.

Session resumed pursuant to adjournment, Mr. Justice Hitz presiding.

* * * * *

Upon consideration of the motion of plaintiff filed herein for an order requiring defendant to disclose her present married name and her home address, and for leave to plaintiff to amend her pleadings by substituting where necessary defendant's said married name, it is ordered that said motion be, and the same is hereby granted.

Further, upon consideration of the motion of plaintiff filed herein for summary judgment for want of a sufficient affidavit of defense, it is ordered that said motion be, and the same is hereby overruled, to which plaintiff prays an exception, which is here noted.

Statement of Defendant's Name and Address.

Filed November 10, 1925.

* * * * *

Comes now the defendant in the above entitled cause and in response to the motion of the plaintiff informs the Court and the plaintiff that her present name is Betty Way Carnduff, and that her address is No. 2018 Hillyer Place N. W.

ROGER J. WHITEFORD,
Attorney for Defendant.

Memoranda.

October 8, 1930.—Jury sworn and respited.

October 9, 1930.—Jury respited.

Supreme Court of the District of Columbia.

Friday, October 10th, 1930.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * *

Before Justice Cox.

Come again the parties hereto, in manner aforesaid and the same jury that was respited yesterday; whereupon, after this cause is further heard and given to the jury in charge, they upon their oath say they find in favor of the plaintiff, and that the money payable by defendant to the plaintiff by reason of the premises, is the sum of Two Thousand Dollars with interest from September 25, 1924.

Memorandum Opinion.

Filed February 11, 1931.

* * * * *

The defendant's motion for a new trial rests on the ground that the Court erred in directing a verdict for the plaintiff. The motion was argued orally, and the excellent and thorough briefs presented by counsel in support of their respective contentions have been carefully considered.

On September 25, 1924, the plaintiff issued her check, signed "L. Clawans", in the following form:

"Newark, New Jersey, September 25, 1924. No. —.

Fidelity Union Trust Company.

Pay to the order of Betty Way Vernon \$2,000.00 Two Thousand and no/100 A loan for 30 days Dollars.

ADDING & CALCULATING CO.

Prop. L. CLAWANS."

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

April Term 1931
Number 5454

LILLIAN CLAWANS, trading under the name)
of Adding and Calculating Company,)

APPELLANT,)

vs.)

BETTY WAY CARNDUFF,)

Appellee.)

REPLY BRIEF OF APPELLANT.

Affidavits of Jurors may be used in support of
verdict.

Appellee contends that the affidavits of jurors cannot be used to support the verdict of the jury.

Although it is true that affidavits or testimony will not be received to impeach or to explain the grounds of their verdict, still the Court will receive the affidavits of jurors when made in support of the judgment such as where the verdict, as received and entered of record, by reason of a mistake, does not embody the true finding of the jury or to correct an erroneous statement of the verdict of the Court or entry by its clerk and affidavits of jurors are admissible when made in support of or to explain a verdict, as for instance, by showing whether interest was computed on plaintiff's claim.

38 Cyc 1902, Sec. C and cases cited.

In the case of Swails vs Cissua, 61 Iowa 693, 17 N.W. p 39, the Court, on appeal, held that the affidavit of a juror should be considered in determining whether the jury had allowed interest in fixing the award.

See notes, bottom of case of Doss, et als vs Tyack, et al, 55 U.S. p. 298, 15 L. Ed. p. 428.

It is, therefore, respectfully submitted that the affidavits of all the jurors in the case are not only proper to be used but do convincingly show that interest was intended to be included and added to their verdict and that there was no misprison of the Clerk warranting the trial Court in modifying the verdict of the jury.

Respectfully submitted,

Lillian Clawans,

D.D. Masucci,

Attorneys for Appellant.

On the following day, the defendant issued her receipt in the following form:

“Washington, D. C., September 26, 1924.

I acknowledge receipt of check of the Adding & Calculating Co. per B. L. Clawans in the sum of \$2,000 dated September 25, 1924, drawn on the Fidelity Union Trust Company, Newark, New Jersey, which I regard as a loan for thirty days as noted on the check.

BETTY WAY VERNON.”

The check was indorsed “Betty Way Vernon” by the defendant in her own handwriting, was duly paid upon presentation, and the defendant received and used the proceeds for her own benefit. The amount of the check was not repaid by the defendant, either to the plaintiff or to any other person.

9 The plaintiff contended and now contends (citing many authorities) that the check issued and the receipt obtained, evidence the actual transaction and agreement between the parties, that these writings were intended to guard the rights of the plaintiff, that there is no ambiguity about them and no question of fraud or agency, that they are not subject to be varied by parol evidence, and that every consideration of justice and sound policy requires that they be respected and accepted at their face value. The defendant, on the other hand, cites numerous authorities which she claims support her contention that, under the circumstances, parol evidence is properly admissible to show that the plaintiff was not the maker of the loan.

On the trial, over the plaintiff's objection, the defendant was permitted to introduce evidence by which she attempted to show the loan to have been actually made, not by the plaintiff, but by one Ethel Clawans, a sister of the plaintiff then in the employ of the defendant. This attempt resulted in testimony *pro* and *con* conflicting in character, and characterized by bitter recrimination and animosity.

On the motion to direct the verdict the view of the plaintiff that the writings should control was accepted, and the testimony to show the loan had been made by Ethel Clawans was regarded as improperly admitted. But even if this evidence be regarded as properly admissible, nothing ap-

peared to show a defense, even if Lillian Clawans, the plaintiff, had stood in the suit as an assignee of Ethel Clawans (although, at the request of both sides, full opportunity was allowed the defendant to show any grounds she might have for refusing to repay the loan, if from Ethel

10 Clawans). On the contrary, it appears from the evidence that the defendant knew that Ethel Clawans had no funds with which to make a loan; that while the defendant, according to her own testimony, may have been told by Ethel that the money was coming from Bertha Clawans, the mother of Ethel and of the plaintiff, and may have read the signature of the check as B. L. Clawans, the receipt was issued because Ethel told her it was desired, not by herself, but by the mother, who was assumed by the defendant to be the maker of the check; that the "Adding & Calculating Company" was in fact a trade name of the plaintiff; that the check was paid with the funds of the plaintiff; that neither Ethel nor Bertha Clawans ever demanded or made claim for the repayment of the loan; and that both of them on the trial expressly disclaimed any interest in the loan.

It seems clear, therefore, aside from the question as to whether the check and the receipt are evidence not to be varied by parol, that defendant received for her own use and benefit money of the plaintiff in the sum of two thousand dollars, and has shown no lawful reason or excuse for not repaying it.

When the verdict was directed there was a question whether it should include interest. The verdict was directed for two thousand dollars, the Court suggesting that the interest was a matter to be taken care of by the clerk. This suggestion was based on the assumption that interest, though not included in the verdict, could be included in the judgment under Section 1184 of the D. C. Code. The clerk by mistake entered the verdict as including interest from the date of the check. It would seem, however, that this is not a case covered by Section 1184, in which interest is payable by the contract or by law, but is a case in
11 which interest could properly be awarded only by a finding of the jury. The error could be corrected, of course, by a remittitur of the interest by the plaintiff. But it is thought the error may also be corrected, as suggested in the defendant's brief, by the clerk making the necessary

entry on the minutes to show the verdict merely for \$2,000 as actually directed; and the clerk is instructed to make this correction.

The motion for new trial is accordingly overruled. Judgment may be entered for two thousand dollars on the directed verdict to be shown by the corrected entry on the minutes.

JOSEPH W. COX,
Justice.

February 11, 1931.

Supreme Court of the District of Columbia.

Monday, February 16th, 1931.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * *

By Justice Cox.

Upon consideration of the motion for a new trial filed in this cause and heretofore submitted to the court, it is ordered that the verdict of the jury rendered in this cause be, and the same is hereby amended by striking therefrom, the words: "with interest from September 25, 1924", because of misprision of the clerk in recording the verdict of the jury. Further it is ordered that the motion for a new trial be, and the same is hereby overruled and judgment entered upon the verdict as amended.

12 Wherefore it is considered that plaintiff recover of the defendant herein the sum of Two Thousand Dollars (\$2,000.00), with interest from this date, together with costs of suit to be taxed by the clerk and have execution thereof.

Memorandum as to Plaintiff's Motion for Rehearing on Defendant's Motion for New Trial.

Filed March 17, 1931.

* * * * *

The plaintiff seeks under Section 1184 of the D. C. Code to have interest included in the judgment on the amount of

the verdict from the date she claims that amount was due. The defendant contends that interest cannot be allowed unless included in the verdict, and that even if the Court erred in not directing interest to be included in the verdict, the error cannot now be corrected without a new trial. The instructions granted, and the charge to the jury by Mr. Justice Siddons in *Crane v. Thompson*, Law No. 62,914, are cited to support this contention. The plaintiff does not desire a new trial, and the defendant apparently is willing to pay the judgment as entered, although she has strenuously disputed the propriety of the direction by the Court of any verdict for the plaintiff.

The case has now been tried three times with varying results. As neither the question now presented, nor that presented on the defendant's motion for new trial is free from doubt, it would seem the wiser course to let the judgment as entered stand.

Order may accordingly be entered *overruling* the motion for rehearing.

JOSEPH W. COX,
Justice.

March 17, 1931.

13 *Exceptions, Notice of Appeal in Open Court, Request to Fix Costs and Treat as a Cross-appeal.*

Filed April 6, 1931.

* * * * * * *

Now comes the plaintiff in open Court and excepts to the order of the Court filed herein on the 16th day of February, 1931, amending the directed verdict of October 10th, 1930, entered herein by striking out the words with interest from the 25th day of September, 1924 and for grounds of this exception plaintiff avers; (a) that the Court granted plaintiff's prayer for a directed verdict in favor of the plaintiff; that the Court's attention in open Court was called by the plaintiff's attorney to the fact that interest amounted to \$724.00 and that the Court stated in the presence and hearing of the jury that the clerk would compute the interest; that the jury was thus given to believe that interest would be computed by the clerk and the plaintiff and her counsel so understood from the Court's said statement

that the clerk would so compute it, and the Court itself was of the opinion at that time that the plaintiff was entitled to interest under Section 1184 of the Code of Law of the District of Columbia as set forth in his opinion filed herein February 11th, 1931 denying defendant's motion for a new trial and striking the interest stating that it was a misprision of the clerk; (b) that the jury returned precisely the verdict instructed by the Court, namely, two thousand dollars (\$2,000.00) assuming that interest and costs would be computed by the clerk; that the plaintiff's declaration claimed interest and costs, that the Court's directed verdict for Two thousand Dollars (\$2,000.00) was not what the plaintiff's prayer for a directed verdict covered and which prayer the Court granted and only a directed verdict
14 dict for part of what the plaintiff sued for in her declaration and was not the full amount of which she was entitled in similar cases under the decisions of this Court and the Supreme Court of the United States; (c) that the Court erred interpreting Section 1184 of the Code to the effect that it was not applicable in this case on the question of interest.

The plaintiff further hereby gives notice in open Court of an appeal to the Court of Appeals of the District of Columbia to amend the order of October 10th, 1930 by adding thereto the words "with interest from October 25th, 1924 and costs of this action" and to amend the directed verdict of October 10th, 1930 by adding thereto the words "with interest from October 25th, 1924 and costs of this action"; and further to amend the order and directed verdict of March 17th, 1931 by adding thereto after the words so stricken by said order and substitute in lieu thereof the following, "with interest from October 25th, 1924 and costs of this action."

And plaintiff further hereby moves in open Court to fix costs of appeal in this action in the sum of fifty dollars (\$50.00) cash or one hundred dollar (\$100.00) bond and that this notice of appeal be considered and treated in all respects as a cross appeal to the Court of Appeals of the District of Columbia.

F. D. MASUCCI,
Attorney for the Plaintiff.

The bond for costs on appeal is fixed at \$100.00, or \$50.00 deposit in cash in lieu thereof

JOSEPH W. COX,
Justice.

15 *Order for Appeal & Citation by Plaintiff.*

Filed April 6, 1931.

* * * * *

The Clerk of said Court will enter an appeal to the Court of Appeals on behalf of plaintiff, and issue Citation to the defendant.

F. D. MASUCCI,
Attorney for Lillian Clawans.

Citation of Plaintiff.

Issued April 6, 1931.

* * * * *

The President of the United States of America to Betty Way Carnduff, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal noted in the Supreme Court of the District of Columbia, on the 6th day of April, 1931, wherein Lillian Clawans, trading as Adding & Calculating Company, is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellee, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Alfred A. Wheat, Chief Justice of the Supreme Court of the District of Columbia, this 16 6th day of April, in the year of our Lord one thousand nine hundred and thirty-one.

[SEAL.]

FRANK E. CUNNINGHAM,

Clerk,

By ALF. G. BUHRMAN,

Assistant Clerk.

Service of the above Citation accepted this 6 day of April, 1931.

ROGER J. WHITEFORD,
Attorney for Appellee.

Memorandum.

April 7, 1931.—Deposit check \$50 cost on cross-appeal by Clawans.

Assignment of Errors.

Filed April 23, 1931.

* * * * *

The Court erred:

1. In its order of February 16th 1931, amending the directed verdict returned herein October 10th 1930, by striking out the interest named therein, and in lieu thereof inserting interest to run from the date of the directed verdict;

2. In interpreting Section 1184 of the Code of Laws of the District of Columbia in holding:

(a) that same is not applicable to this case, and

(b) that the \$2,000.00 loan which defendant promised and agreed to repay in thirty days does not bear interest from the date said loan became due and payable;

17 3. In its order that the Clerk of Court made a misprision in entering of record herein the directed verdict;

4. In amending directed verdict by striking out the interest claimed in the Declaration, after having granted plaintiff's prayer No. 1 for a directed verdict, and after having given the jury, plaintiff and her counsel to understand that interest would be computed by the Clerk of Court from date of defendant's default in the payment of the \$2,000.00 loan. In support of this assigned error plaintiff annexes hereto affidavits of the respective jurors who returned the directed verdict.

5. In other respects apparent of record.

F. D. MASUCCI,
Attorney for Plaintiff.

Received a copy of the above Assignment of Errors on this 21st day of April, 1931.

ROGER J. WHITEFORD,
Attorney for Defendant.

Designation of Record.

Filed April 23, 1931.

* * * * *

Now comes the plaintiff, Lillian Clawans, by her counsel, in the above entitled cause and designates the parts of the record which she desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on cross appeal, namely:

1. Declaration, affidavit of merit and certificate of service, filed January 26th 1925.

2. Appearance of Whiteford for defendant filed February 24th 1925.

3. Plea of defendant and affidavit of defense filed February 24th 1925.

18 4. Motion to substitute married name of defendant and notice filed November 2nd 1925.

5. Defendant ordered to disclose her married name, etc and plaintiff granted leave to amend in accordance therewith and motion for judgment overruled, filed November 9th, 1925.

6. Statement of defendant's name and address filed November 10th 1925.

7. Jury sworn on October 8th 1930 and respited.

8. October 9, 1930. Jury respited.

9. October 10th 1930, trial resumed, same Jury.

10. Copy of Plaintiff's Prayer No. 1. praying for a directed verdict;

11. Copy of Order granting Plaintiff's prayer for a directed verdict.

12. Copy of Order directing jury to return verdict for the plaintiff;

13. Directed verdict for plaintiff for \$2,000.00 with interest from September 25, 1924 (M 80 p. 461).

14. Memo opinion of Justice Cox on motion for a New Trial filed February 11, 1931.

15. Order Verdict of Jury amended because of misprision by striking therefrom the words "*with interest from Sep-*

tember 25, 1924'' and motion for New Trial overruled and judgment for plaintiff for \$2,000.00 and interest from date and costs (M 82 p. 87) filed February 16th 1931;

16. Memo. of Justice Cox filed March 17th 1931;

17. Plaintiff's exceptions, Notice of Appeal in open Court to Court of Appeals, to so much of Order striking out interest, request to fix costs and treat as cross appeal, filed April 6, 1931.

19 18. Enter appeal to Court of Appeals on behalf of plaintiff herein and Order for Citation, filed April 7, 1931.

19. Citation issued filed April 7, 1931.

20. Citation writ returned service accepted by Roger J. Whiteford, attorney for defendant, filed April 7, 1931.

21. Order of April 7, 1931, fixing costs of appeal in the sum of \$50.00 cash or a bond for the amount of \$100.00.

22. Deposited by L. Clawans, the plaintiff, in lieu of undertaking on appeal \$50.00 April 7, 1931.

23. Plaintiff's assignment of Errors filed Apr. 23, 1931.

24. Together with a copy of this designation.

F. D. MASUCCI,
Attorney for Plaintiff.

Received a Copy of above Designation of Record this 21st day of April, 1931.

ROGER J. WHITEFORD,
Attorney for Defendant.

20

Fi. Fa.

Issued April 11, 1931.

* * * * *

The President of the United States to the Marshal for said District, Greeting:

You are hereby commanded, that of the goods and chattels, lands and tenements of the defendant, you cause to be made \$2,000.00 (interest not to be computed on this writ) which the plaintiff, on the 16'' day of February, 1931, by the judgment of said Court, in the above-entitled cause, recovered against said defendant for money found payable to said plaintiff, and \$108.64 for costs and charges, about said suit expended, as appears of record; and return this writ into the clerk's office of said Court on or before the sixtieth

day from the date hereof, so indorsed as to show when and how you have executed the same.

Witness the Honorable Alfred A. Wheat, Chief Justice of said Court, the 11th day of April, A. D. 1931.

[SEAL.]

FRANK E. CUNNINGHAM,
Clerk,

By ALF. G. BUHRMAN,
Assistant Clerk.

Marshal's Return.

Demand made on Roger Whiteford, Atty. for defendant, 4/11/31, by Callahan. Satisfied as to Judgment Demand fee and costs in full April 11, 1931.

EDGAR C. SNYDER,
U. S. Marshal,
By WM. J. KIRKLAND,
Deputy.

21 *Defendant's Additional Designation of Record.*

Filed April 23, 1931.

* * * * *

To the Clerk:

Please prepare and include in the designation of record on appeal to the Court of Appeals in above entitled case, the following, in addition to the designation of record filed herein by plaintiff:

1. Writ of fieri facias issued April 11, 1931, by order of plaintiff, and returned satisfied in full as to principal and costs.

2. Entry showing payment of proceeds of writ of fieri facias to Lillian Clawans, April 13, 1931.

WHITEFORD, MARSHALL & HART,
By P. H. MARSHALL,
Attorneys for Defendant.

22 *Stenographic Report.*

Filed April 24, 1931.

* * * * *

Now comes the plaintiff by her counsel and files herewith the transcribed stenographic report of the Judge's remarks and counsels' statements in relation to interest made

in the presence of the Jury and directing the Jury to return a verdict for the plaintiff.

F. D. MASUCCI,
Attorney for Plaintiff.

Before Justice Joseph W. Cox.

* * * * *

Friday, October 10, 1930.

The Court: I do not know whether the jury's verdict will reflect the true situation or not; whether it would decide on collaterals is another question.

But feeling as I do about it I think that the simplest course and what I think I will take is that I believe I will direct a verdict upon the plaintiff's case for the amount of this note and you can take it up to the Court of Appeals.

Mr. Whiteford: A directed verdict for the plaintiff is a proposition that in the case of Davis vs. M—— the United States Supreme Court says you cannot do.

The Court: That is new.

Mr. Masucci: That is a new one on me.

Mr. Whiteford: They say it is always a question for the jury.

Mr. Masucci: There has been no question for the jury.

* * * * *

23 The Court: Feeling as I do I think I will rule that way.

Mr. Whiteford: I will note an exception to Your Honor's ruling.

The Court: Exception noted. Let the jury come in.

(Thereupon the jury returned to the court room and were seated.)

Mr. Masucci: There is interest on that for six years, \$724.50.

The Court: From what date?

Mr. Masucci: From the date of the check.

Mr. Whiteford: The jury does not compute that.

Mr. Masucci: The jury computes it.

The Court: No, the Clerk computes that.

Gentlemen of the jury, we have had here some argument with reference to the law in the case as a result of which I have come to the conclusion that the contract here, this check, the endorsement on it, in connection with the receipt which was given for it, constitute a contract between the parties, this defendant here, Mrs. Betty Way Vernon, and the plaintiff, Miss Lillian Clawans.

Having reached that conclusion I have come to the conclusion that the evidence we have had in the case which would have varied or changed the nature of that was not admissible evidence but it is a matter we should disregard, and that the parties were bound by this written agreement entered into between them, and having reached that conclusion it follows that I am required to direct you to find a verdict for the plaintiff for the two thousand dollars claimed in the declaration. That is a matter of law.

24 Mr. Whiteford: I want to except to Your Honor's ruling on the grounds that have already been urged in the record as to the admissibility of the testimony. I do not know just what testimony Your Honor strikes out under your ruling.

The Court: The jury would have to disregard the testimony that changes the result of this contract.

Mr. Whiteford: Then you strike out all the testimony of the defendant.

The Court: I am telling the jury——

Mr. Whiteford: I want a ruling so that I have a record that can be used.

The Court: Should not that be taken up after the judgment is entered.

Mr. Whiteford: I must make my exception.

The Court: I am instructing the jury that the agreement as manifested by the writing there is binding on the parties and the indebtedness admitted which has not been paid—that the jury should return their verdict for the plaintiff.

Mr. Whiteford: I want my exception and ruling. I do not know what testimony Your Honor has stricken out. But whatever it is that you strike out I except to the striking out of any of it that changes our ruling, the testimony that we offered, and I except further on the ground that Your Honor in law has no right or authority to direct a

verdict in favor of the plaintiff in this case because it is a matter for the jury to determine regardless of what the verdict would be.

The Court: The exception will be duly noted. The Clerk will take the verdict of the jury.

25 (At 11.45 a. m. the trial of the above entitled cause was concluded.)

DISTRICT OF COLUMBIA, ss:

I certify that the foregoing is a transcript of a portion of the testimony taken by me in shorthand, and transcribed, at the trial of Clawans vs. Carnduff on Friday, October 10, 1930.

FRED H. MONK.

Subscribed and sworn to before me this 20th day of April, 1931.

[NOTARIAL SEAL.]

SYLVESTER L. McLAURIN.

Supreme Court of the District of Columbia.
No. 69784.

Parties.

Lillian Clawans, Trading as Adding & Calculating Company,

v.

[Betty Way Vernon]*
Betty Way Carnduff.

Action.
A/c
\$2,000.00

Plaintiff's Attorney.

Geo. F. Curtis.
D. L. Grantham.
J. F. Lillard.

Costs.

Attorney.....
Marshal.....
Clerk.....
Witnesses.....
Depositions.....

Defendant's Attorney.

Whiteford.

Examiner.....
J. P.....

Proceedings.

Clerk's costs.

Date.

Deposits.

1925, Jany.	26.	Deposit toward costs by Curtis.....	15.	.....	.....
"	"	Appearance, order, Dec'l. Par. D. & Aft., filed.....	.....	1.15	.....
"	"	Summons (2) & copy decl., issued.....	.....	2.25	.....
"	"	" " served.....	.....	.25	.....
"	"	29. Copy decl. Aft. & Cert. of service issued to Plff's Atty.....	.....	1.30	.....
Feby.	17.	Appearance Whiteford for Deft. Mo. for security for costs & Notice filed.....	.....	.90	.....
"	"	20. \$50 deposited by Plff. as security for costs.....	50.	.50	.....
"	"	" Mo. of Plff. for leave to give security, filed.....	.....	.25	.....
"	"	" Leave to Plff. to deposit \$50 as security (M. 74 p. 398).....	.....	.60	.....
"	"	24. Plea of defdt. & affidavit of defense, filed.....	.....	.50	.....
"	"	25. Joinder & Note of Issue filed, calendared.....	.....	.90	.....
				8.60	.....
"	Nov.	2. Mo. to substitute married name of deft. & Notice, filed.....	.....	.50	.....
"	"	2. Mo. for judgt. & Notice, filed.....	.....	.50	.....
"	"	6. Spas. (2) Deft. 1 Wit. issd. & served.....	.....	.75	.....
"	"	9. Deft. ordered to disclose her married name etc. & Plff. granted leave to amend in accordance therewith & Mo. for Judgt. overruled (75 p. 463).....	.....	.60	.....
"	"	10. Statement of defts' name & address, filed.....	.....	.25	.....
"	"	" Certified copy decl. & aft. issued to Curtis.....	.....	1.40	.....
				4.00	.....
1926, Jany.	13.	Mo. to set aside continuance & Notice, filed.....	.....	.50	.....

"	Apr.	8.	Mo. of Plff. for commission to issue & ack. of service.	.....	.50
"	"	8.	Commission ordered to issue (oral)	.....	.30
"	"	8.	Commission issued to Jno. Q. Frey 114 Market St. Newark, N. J. to take depts. of Olga Galfy for plff. orally	.....	1.00
"	May	5.	Motion to amend commission issued April 8 to include deposition of Blanche Weiner for plff. orally & order of Hitz Judge to issue amended commission & ack. of service, filed	.....	.75
"	"	5.	Amended commission issued to Jno. Q. Frey 114 Market St., Newark, N. J., to take depositions of Olga Galfy & Blanche Weiner	.....	1.00
"	"	28.	Depos. (2) for Plff. pub. & filed (fee \$15.24)	.....	.25
"	June	26.	Spas. (8) Plff. 4 Wits., served	.....	3.00
"	"	28.	Deposit for costs by plff.	15.00	.....
"	"	28.	Appearance D. L. Grantham for plff. order, filed	.....	.40
"	"	28.	Spas. (2) Plff. 1 wit., served	.....	.75
					7.95
"	Oct.	9.	Deposition de bene esse for defdtd. (1) (Betty Buchanan) fee \$34.50	.....	.25
"	"	9.	" of Mrs. C. F. Forsythe for Defd. pub. & filed \$12.50	.....	.25
"	"	11.	Spas. (6) Plff. 3 Wits. ret. served all	.....	1.50
"	"	12.	App. A. Carnduff for plff.—order, filed	.....	.40
"	"	18.	Spas. (2) plf. (1) wit. issued	.....	.75
"	"	18.	Aftt. of R. J. Whiteford, filed	.....	.25
"	"	18.	Appearance Lillard for Plff. order, filed	.....	.40
"	"	13.	Spas. (2) plfs. (1) wits. issued & ret'd. served	.....	.75
"	"	18.	" (2) defdtd. (1) " " " "	.....	.75
"	Dec.	10.	" (2) Plff. 1 " " " "	.....	.75
"	"	10.	" (2) " 1 " " " "	.....	.75
"	"	10.	" (2) " 1 " " " "	.....	.75
"	"	21.	Deposit for costs by plaintiff	7.50	.....
27	"	23.	Spas. (3) plff. (2) wits. issued & ret'd. served both	.....	1.00
"	"	23.	" (2) dft. (1) " " " "	.....	.75
"	"	21-22.	Jury sworn & respited (M. 77 p. 298-300)	.....	.90
"	"	23.	Verdict for defdtd. (Prayers filed) (" " 301)	.....	.25
"	"	28.	Motion for a new trial & Notice (M. 77 p. 304)	.....	.60
"	"	29.	Amended motion for a new trial, notice & exhibit (M. 77 p. 305)	.....	.80
"	"	31.	Ack. of service of Mo. for new trial, filed	.....	1.05
					.25
					13.15

[*Erased in copy.]

"	25.	Spa. ad. test. (9) plfs. (8) wits. Retd. served 5—Not found 3.	.....	2.50
"	21.	" (3) deflt. (2) Wits. (Retd. served all 10/21/29).	.....	1.
"	28.	" (3) Plff. (1) wit. issued, served.	.....	1.00
"	29.	" (2) deflt. (1) wit. issued served.	.....	.75
"	"	" (3) Plff. d. t.	.....	1.50
"	"	Docket & index.	.....	3.00
"	"	Charges for docket entries of Dec. 10-12, 1928 (60¢ & 30¢)	.....	.90
"	28.	Jury sworn & respited (M. 80 p. 145).	.....	.60
"	29.	Jury respited. (M. 80 p. 146).	.....	.30
1929,	Oct.	30. Jury disagrees, are discharged & case cont'd (M. 80 p. 148).	.....	.30
"	"	Prayers each filed.	.....	.50
"	Nov.	1. Mo. of plff. to advance for trial & notice.	.....	.50
"	"	Spas. (6) Plff. 5 Wits. issd 4 served.	.....	1.75
"	"	18. Deposit by Plff.	.....	1.60
"	"	11. Memo. opin. of Court (Wheat J.) on mo. to advance.	.....	.25
"	"	12. Mo. to advance cause for hearing denied (M. 80 p. 163).	.....	.30
"	"	14. Letter from Lillian Clawans noting exception to overruling motion to advance, filed.	.....	.25
"	Dec.	6. Deposit for costs by Clawans.	10.00	.....
"	"	6. Copy of docket entries for Clawans.	.....	2.00
1930	Feb.	26. Mo. of Plff. to advance cause & Notice, filed.	.....	18.30
"	Mch.	7. " " " denied (M. 81 p. 212).	.....	.50
"	"	14. Paid to Ethel Clawans, Atty., by check.	25.00	.30
"	"	22. Mo. of Plff. to advance for trial & Notice, filed.	175.85	.....
"	May	6. " " " overruled (M. 81 p. 272).	.....	.30
"	Oct.	6. Spa. (2) Wit. (1) issued for deflt. (Ret'd served).	.....	.75
"	"	6. " (7) for plff. (6) wits. issued (Ret'd served).	.....	2.00
"	"	Spa. d. t. plff. (2) & wits. (1) issued (Ret'd served).	.....	.75
"	"	" " (2) & " (1) "	.....	.75
"	"	" " (2) & " (1) "	.....	.75
"	"	" " (2) & " (1) "	.....	.75
"	"	7. " (2) deflt. (1) wit. issued (Retd. not found).	.....	.75

Date.	Proceedings.	Deposits.	Clerk's costs.
1930 Oct.	8. Four writs, plfs. 2 witnesses issued served.....	.....	1.50
"	8. Jury sworn & respited (M. p. ).....	.....	.60
"	9. Spa. d. t. plff. (2) & wit. (1) issued served.....	.....	.75
"	10. " (4) plff. (3) wit. served.....	.....	1.25
"	10. " (2) " (1) ".....	.....	.75
"	9. Jury respited.....	.....	.30
"	10. Trial resumed. Same Jury—Directed verdict for Plff. for \$2000.00 with interest from September 25, 1924—(M. 80, p. 461).....	.....	.90
"	15. Mo. for new trial filed & entered (M. 80 p. 466).....	.....	.75
"	24. " " cont'd to Oct. 31/30 (M. 80 p. 479).....	.....	.30
"	31. " " submitted (M. 80 p. 490).....	.....	.30
			13.90
1931, Feby.	11. Memo. opinion of Justice Cox on motion for new trial, filed.....	.....	.25
"	16. Verdict of Jury amended because of misprision by striking therefrom the words "with interest from September 25, 1924" & Motion for new trial overruled & Judgment on verdict for Plff. for \$2000.00 & int. from date & costs (M. 82 p. 87).....	.....	1.50
"	20. Motion for re-hearing filed.....	.....	.25
"	17. " " Memo. of Cox, J., filed.....	.....	.25
Mch.	" " overruled (M. 82 p. 122).....	.....	.30
"	27. Enter appeal to Court of Appeals from the Judgment rendered herein & order for citation, filed.....	.....	.25
"	27. Citation issued (Sent by Mail) (4).....	.....	4.25
"	31. " writ ret'd: Service accepted by F. D. Masucci, Atty. for appellee.....	.....	.25
29 "	31. Order of Mch. 27/31. Fixing penalty of Supersedeas undertaking on appeal at \$3000. (M. 82, p. 138).....	.....	.30
			7.60
"	2. Deposit by Plff.....	1.00	
Apr.	3. Certified copy order correcting verdict.....	.....	1.25
"	" copies Docket Entries issued.....	.....	3.50
"	6. Exceptions: Notice of Appeal in open Court, request to fix costs and treat as a cross appeal, filed.....	.....	.25
"	" Appeal entered by Plff. & order for Citation, filed.....	.....	.40
"	" Citation, writ of issued & copy.....	.....	2.00
"	" Bond on appeal by Plff. fixed at \$100., for costs or \$50. deposit in lieu thereof (M. 84 p. 20).....	.....	.30
"	6. Citation of Plff. ret'd Service accepted by Whiteford.....	.....	.25

"	"	7. Deposit check \$50.00 Cost on Cross Appeal by Clawans.	50.00	
"	"	8. Deposit " \$50.00 " " by Lillian Clawans.	50.00	.50
			276.85	
"	"	10. Cert. copy of verdict to pltf.		.75
"	"	11. Fi. fa. issued & ret'd Satisfied in full, as to Judgment & costs only (Interest in abeyance).		1.65
"	"	13. Paid to Lillian Clawans by check.	50.00	
			226.85	
"	"	23. Assignments of Error (Plff.) & 11 Affts., filed.		3.00
"	"	" Designation of record by Plff., filed.		.25
"	"	" " counter of Deft., filed.		.25
"	"	24. Additional Designation of record by Plff., filed.		.25
"	"	" Stenographic report relating to interest, filed.		.50
"	"	27. Affts (11) filed by Plff., Apr. 23/31 certified.		7.15
"	"	28. Plff's proposed Bill of Exceptions filed.		.25
"	May	4. Objections & proposed amendments to Bill of Exceptions, filed.		.25
"	"	21. Certificate Plff's wits filed (\$984.44)		.25
"	"	26. Plff's mo. for order to show cause & Protest to Deft's addl Designation of record, filed.		.25
"	"	" Plff's further Designation of Record, filed.		.25
"	June	1. Fi. fa. witness fees, etc., issued.		1.65
"	"	5. Time for hearing on Bill of Ex. extended to June 15, 1931 (Cox, J.) (M. 84, p. 133)		.30
"	"	8. Cert. copy of defs addl desig. of record.		.75
"	"	9. Motion to correct Marshal's return on Fi. fa.		.25
"	"	" Rule to Whiteford & Marshall to show cause by 15 th inst. why entry of "Judgment satisfied in Full" should not be stricken, filed.		.55
"	"	" Rule to Show Cause, copies (2) & motion issued.		2.50
"	"	10. Motion to quash execution issued June 1, 1931, Notice & P. & A., filed.		.50
"	"	13. Mo. of Plff. to strike defs' motion to quash Execution & Notice, filed.		.50
"	"	" Proposed Bill of Ex. by Plff, filed.		.25
"	"	15. Return of Whiteford & Marshall to rule to show cause, filed.		.25
"	"	15. Notice of Motion filed June 13/31, filed.		.25
"	"	" Hearing on Bill of Ex. cont'd to 17th inst. (84 p. 148)		.30
"	"	17. Opposing P. & A. of deft. to motion to strike, filed.		.25

		Proceedings.		Deposits.	Clerk's costs.
Date.					
30					
1931	Oct.	17. Objections & Suggestions to substitute Bill of Exceptions, filed.	.....		.25
"	"	" Bill of Ex. of Plff. submitted (M. 84 p. 159) . . . . .	.....		.30
"	"	18. Writ of Fi. fa. of June 1/31 quashed. Ex. by Plff., Appeal noted (M. 84, p. 160) . . . . .	.....		.60
"	"	19. Rule discharged (M. 84, p. 160) . . . . .	.....		.30
"	"	" Memo. Cox, J. on motion to quash Fi. fa. of June 1/31, filed . . . . .	.....		.25
"	"	" " Bill of Exceptions (84, p. 161), filed . . . . .	.....		.25
"	"	29. Addl. Designation by Plff., filed . . . . .	.....		.25
"	"	30. Notice of Appeal in open Ct. from order quashing Fi. fa. of June 1/31, filed . . . . .	.....		.40
"	"	" Bond for costs on said appeal fixed at \$50. or deposit of \$10. dollars (M. 84, p. 179) . . . . .	.....		.30
					<u>34.70</u>
"	"	" \$10.00 deposited by Plff.	10.00		
"	July	3. Mo. to strike out Designation filed June 29/31. P. & A., filed . . . . .	.....		.50
"	"	10. Mo. of Plff. for continuance on hearing, filed . . . . .	.....		.25
"	"	" Mo. to strike designation cont'd to July 17 (M. 85, p. 191) . . . . .	.....		.30
"	"	20. Opposing P. & A. filed . . . . .	.....		.65
"	"	" Assignments of Error, filed . . . . .	.....		.25
"	"	" Further Designation of record, filed . . . . .	.....		.25
"	"	" Mo. to strike designation withdrawn (M. 84, p. 202) . . . . .	.....		.30

31

Additional Designation of Record.

Filed April 24, 1931.

* * * * *

Now comes the plaintiff by her counsel and designates further documents, namely:

(a) Transcribed stenographic report of the proceedings had upon the rendition of the verdict.

(b) Docket entries in the above entitled cause.

F. D. MASUCCI,
Attorney for Plaintiff.

32

Affidavits of Jurors.

Filed April 23, 1931.

* * * * *

DISTRICT OF COLUMBIA, ss:

Harry G. Albrecht, being first duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th. 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statements by the Court that the Clerk would compute interest from the date the loan became due and payable and would also compute the costs. I rendered said verdict so understanding.

HARRY G. ALBRECHT,
Juror.

Subscribed and sworn to before me this 22nd day of April, 1931.

[NOTARIAL SEAL.]

NELSON D. BRECHT,
Notary Public, D. C.

My commission expires Sept. 9, 1931.

DISTRICT OF COLUMBIA, ss:

George J. Alft, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and

10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, 33 having understood statement by the Court that the clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

GEORGE J. ALFT,
Juror.

Subscribed and sworn to before me this 21st day of April, 1931.

[SEAL.]

FRANK E. CUNNINGHAM,
Clerk,
By ANDREW A. HORNER,
Asst. Clerk.

DISTRICT OF COLUMBIA, ss:

J. Robert Corry, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court that the Clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

J. ROBERT CORRY,
Juror.

34 Subscribed and sworn to before me this 21st day of April 1931.

[NOTARIAL SEAL.]

JULIA E. ADAMS,
Notary.

DISTRICT OF COLUMBIA, ss:

Earle M. Dawson, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court that the clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

EARLE M. DAWSON,

Juror.

Subscribed and sworn to before me this 22d day of April, 1931.

[NOTARIAL SEAL.]

FRED W. CROMWELL,

Notary Public, D. C.

35 DISTRICT OF COLUMBIA, ss:

Ernest E. Day, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court that the Clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

ERNEST E. DAY,

Juror.

Subscribed and sworn to before me this 21st day of April, 1931.

[NOTARIAL SEAL.]

J. W. HARPER.

DISTRICT OF COLUMBIA, ss:

T. Walter Jones, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court that the Clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to do not know or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

T. WALTER JONES,
Juror.

Subscribed and sworn to before me this 21st day of April, 1931.

[NOTARIAL SEAL.] CHARLES L. HUTCHINSON,
Notary Public.

My commission expires Apr. 23, 1934.

DISTRICT OF COLUMBIA, ss:

Harry D. Palmer, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court that the clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

HARRY D. PALMER,
Juror.

Subscribed and sworn to before me this 8th day of April, 1931.

[NOTARIAL SEAL.] J. WALTER STEPHENSON,
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

Clarence Rees, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court that the clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

CLARENCE REES,
Juror.

The foregoing affidavit was signed in my presence April 22nd, 1931.

ETHEL CLAWANS.

38 Subscribed and sworn to before me this 23rd April, 1931.

[SEAL.]

FRANK E. CUNNINGHAM,
Clerk,

By ANDREW A. HORNER,
Asst. Clerk.

DISTRICT OF COLUMBIA, ss:

I, Charles G. Rose, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court that the clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so

understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

CHARLES G. ROSE,
Juror.

Subscribed and sworn to before me this 21st day of April, 1931.

[NOTARIAL SEAL.] JOHN W. TALLENTIRE,
*Notary Public in and for the
District of Columbia.*

39 DISTRICT OF COLUMBIA, ss:

Abraham Schumacher, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court that the clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

ABRAHAM SCHUMACHER,
Juror.

Subscribed and sworn to before me this 22nd day of April, 1931.

[NOTARIAL SEAL.] WM. R. DELASHMUTT,
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

S. Earl Upperman, first being duly sworn, deposes and says as follows: I was a juror sitting on October 8th, 9th and 10th 1930 in the Supreme Court of the District of Columbia before Mr. Justice Cox presiding and that as a juror I returned a directed verdict in the sum of Two
40 Thousand Dollars in favor of plaintiff by order of the Court, having understood statement by the Court

that the clerk would compute the interest from date the loan became due and payable and would also compute the costs. That I so understood from the statements by plaintiff's counsel that the interest then due amounted to \$724.00 or thereabouts and the Court stated that it would be computed by the clerk and I rendered said verdict of so understanding.

S. EARL UPPERMAN,
Juror.

Subscribed and sworn to before me this 22d day of April, 1931.

[NOTARIAL SEAL.] CHARLES L. HUTCHINSON,
Notary Public.

My commission expires Apr. 25, 1934.

*Plaintiff's Motion for an Order to Show Cause and Protest
to Defendant's Additional Designation of Record.*

Filed May 26, 1931.

* * * * *

Comes now the plaintiff in the above entitled cause and represents to the Court that she perfected an appeal to the Court of Appeals from so much of the amended directed verdict herein as strikes out interest from September 25th, 1924, which is the sole question of said appeal, questioning the interpretation of Section 1184 of the Code of Laws of the District of Columbia. That pending the final determination of said appeal, the plaintiff had a fi. fa. issued for so much of the amended directed verdict as was not appealed from.

Whereupon the U. S. Marshal on said fi. fa. was
41 paid by the defendant \$2109.64 as evidence- by his
check on the Second National Bank, dated April 13th, 1931 and letter of transmittal and which letter he sets forth said check was in satisfaction of judgment.

Whereupon the plaintiff wrote to the U. S. Marshal protesting against his averment in said letter that said amount was in settlement of said judgment and mailed a carbon copy of said letter to the Clerk of the Supreme Court of the District of Columbia, and the plaintiff further advises the U. S. Marshal that she has not cashed said check, did not

accept same in settlement, but holds the check as evidence.

Plaintiff has been informed that the U. S Marshal returned said fi. fa. as executed in satisfaction of judgment.

Plaintiff is further advised by defendant's attorney that he has instructed the Clerk to enter as a further designation of record the said fi. fa. as settlement of the judgment in full. Manifestly plaintiff avers that if said docket entries and said further designation of record is filed in the Court of Appeals as part of the transcript of record herein the appellant court will be misled and plaintiff's appeal will be nullified.

The U. S. Marshal and defendant's attorney are charged with knowledge of plaintiff's perfected appeal from so much of the amended directed verdict as strikes out interest due on the Two Thousand Dollars (\$2000.00) principal for over six years amounting to wit; Seven Hundred Eighty five Dollars (\$785.00).

Wherefore the premises considered, the plaintiff moves the Court for an order to show cause on the said defendant, U. S. Marshal and Clerk to show cause if any there be why said docket entires of said return in said fi. fa. and

42 the said docket entries of the defendant's further designation of record of said fi. fa. in satisfaction of judgment should not be corrected and a correct entry made that said amount of \$2109.64 is but part settlement of said amended directed verdict, in that said amount does not include the interest awarded plaintiff under the amended directed verdict, namely October 10th, 1930 to April 13th, 1931, said order amending directed verdict, reverting back to the date of directed verdict. That said amount does not include the correct costs due plaintiff and further that it does not include witness fees, traveling expenses of plaintiff's non-resident witnesses from Baltimore and Newark, N. J. and because of other errors apparent in the U. S. Marshal's said letter of transmittal and the docket entries.

F. D. MASUCCI,
Attorney for Plaintiff.

Memorandum.

April 28, 1931.—Plaintiff's proposed Bill of Exceptions filed.

Further Designation of Record.

Filed May 26, 1931.

* * * * *

The Clerk will prepare on appeal the further designation of record by including the following, namely:

1. Affidavits of jurors annexed to plaintiff's assignment of errors.

2. Plaintiff's protest against defendant's further designation of record.

43 3. Copy of plaintiff's said letter to U. S. Marshal protesting against his letter of transmittal of check in satisfaction of the judgment, a copy of which letter was mailed to the Clerk of the Court.

4. Defendant's prayer #1 and order denying same.

5. Plaintiff's motion for an order to show cause filed May 26, 1931.

6. Memo.—Proposed Bill of Exceptions filed April 28th, 1931.

F. D. MASUCCI,
Attorney for Plaintiff.

44 *Order for Execution, &c.*

Filed April 11, 1931.

* * * * *

The Clerk of said Court will issue execution as hereinafter requested provided the defendant has not perfected her appeal by deposit of a supersedeas bond in the sum of \$3000 namely, issue execution for \$2000 and costs to date & leave open the amount of interest named by directed verdict until the final determination by the Court of Appeals of plaintiff's appeal from so much of the order amending the directed verdict allowing interest only from date of directed verdict.

LILLIAN CLAWANS.

Motion for a Rule to Show Cause.

Filed June 9, 1931.

* * * * *

Comes now the plaintiff, above named and moves the Court for an order to show cause directed to defendant, and Roger J. Whiteford and P. H. Marshall, attorneys for defendant above named, why their written notice to the Clerk of this Court to enter in the designation of record on appeal "Judgment satisfied in Full" should not be stricken from the files of this Court and for grounds of this motion plaintiff avers on information and belief that said written notice is absolutely false and known to them to be false and was made in obstruction of justice and was an imposition upon the Court and was made with intent to deceive the Court of Appeals and defeat a fair hearing of plaintiff's appeal noted and perfected herein in that they were personally served with notice of plaintiff's appeal from

45 so much of judgment herein made March 17th, 1931 amending directed verdict made herein October 10th, 1930 in the following words; by striking from said verdict the interest from September 25th, 1924 to date of said directed verdict and knowing and charged with personal knowledge that said amended directed verdict from date which reverted to the date of directed verdict bore interest at 6% from October 10th, 1930 to date of writ of execution when the defendant's attorneys paid the sum of \$2000.00 without interest notwithstanding the so called amended directed verdict bore interest from October 10th, 1930 to writ of execution in the amount of \$60.00 and said attorneys knew plaintiff's witnesses fees and non-resident witnesses fees, traveling expenses had not been paid and knew further that \$124.05 was withheld by the Clerk of the Court from plaintiff pending her appeal, nevertheless in the face of this indisputable and irrebuttable fact they directed the Clerk of the Court to make the aforesaid entry "Satisfied in full as to principal and costs" notwithstanding the further fact that this Court has held that U. S. Marshal's return in the words "Judgment Satisfied in Full" does not mean that it is not in settlement of interest in question on appeal and the clerk himself, through his assistant Alfred Buhrman has stated in this Court before Mr. Justice Cox presiding

that said writ of execution was not intended to include amount of interest in question on appeal and that said Alfred Buhrman also stated in this Court that he had specific instructions from the plaintiff not to issue writ of execution if it would jeopardize the amount of interest in question on appeal, all of which the said attorneys Roger J. Whiteford and P. H. Marshall knew.

LILLIAN CLAWANS.

46

Rule to Show Cause.

Filed June 9, 1931.

* * * * *

Upon motion by plaintiff and good cause appearing therefor it is hereby ordered that Roger J. Whiteford and P. H. Marshall, attorneys for defendant herein, show cause if any there be on the 15th day of June, 1931 ten o'clock forenoon why then and there written notice to the Clerk of this Court to enter in the designation of record on appeal the following entry "Judgment satisfied in Full" should not be stricken from the files of this Court; provided that a copy of said motion and this order be served upon Roger J. Whiteford and P. H. Marshall at least two days before the date aforesaid.

JENNINGS BAILEY,
Justice.

Supreme Court of the District of Columbia.

Monday, June 15, 1931.

Sessions resumed pursuant to adjournments.

Hon. Jennings Bailey, Joseph W. Cox, James M. Proctor,
Justices, presiding.

* * * * *

It is this day ordered that the time for hearing of the Bill of Exceptions herein be and the same is hereby extended to and including June 17, 1931.

COX,
Justice.

Thursday, June 18, 1931.

Sessions resumed pursuant to adjournments.

Hon. Jennings Bailey, James M. Proctor, Joseph W. Cox, Justices, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record and whereupon, after consideration of the motion filed herein to quash the writ of execution issued in this cause on June 1, 1931, it is ordered that said motion be and the same is hereby granted. Whereupon, it is ordered that said writ of execution issued herein on June 1, 1931 be and the same is hereby quashed, vacated, set aside and for naught held.

To the foregoing order the plaintiff, in open court, notes an exception which is duly allowed. Appeal noted.

COX,
Justice.

Order Discharging Rule.

Filed June 19, 1931.

* * * * *

This case came on to be heard upon the rule to show cause issued herein on the 9th day of June, 1931, the motion upon which said rule was issued, and the return of the respondents, and was argued by counsel, whereupon, it is, by the Court, this 19th day of June, 1931,

Adjudged and ordered that said rule be, and the same hereby is discharged.

JOSEPH W. COX,
Justice.

Memorandum Opinion.

Filed June 19, 1931.

I sustain the within motion to quash, rather than stay execution until action of the Court of Appeals on the appeal now pending in this cause, in the hope that a review by that Court of the questions presented on said motion to quash

may be obtained by special appeal or otherwise, in connection with the said pending appeal.

JOSEPH W. COX,
Justice.

June 19, 1931.

Memorandum Opinion.

Filed June 19, 1931.

The within substituted bill of exceptions was submitted to the Court on the 17th day of June, 1931. The Court, upon examination of the said bill, the objections filed thereto by counsel for defendant, and after argument, being of the opinion that the bill was not in proper form to be signed, took the same under advisement for the purpose of suggesting the changes deemed necessary to be made. On the following day, June 18, 1931, the plaintiff in person appeared in open court and requested the Court either to sign or decline to sign the bill as submitted and not to attempt to settle it otherwise. The bill is accordingly not signed because considered not in proper form, and as not presenting matter material to her appeal other than already apparent from the record.

JOSEPH W. COX,
Justice.

June 19, 1931.

49 Supreme Court of the District of Columbia.

Friday, June 19, 1931.

Sessions resumed pursuant to adjournments.

Hon. Jennings Bailey, Joseph W. Cox, Justices, presiding.

* * * * *

It is hereby ordered by the court pursuant to its memorandum filed June 19", 1931; wherein it is considered that the substituted bill of exceptions submitted herein by the plaintiff, on the 17th day of June 1931, cannot be signed by the court, that it likewise cannot be made of record in this cause.

COX,
Justice.

Further Designation of Record.

Filed June 29, 1931.

* * * * *

The Clerk will prepare on appeal the further designation of record, by including the following, namely:

1. Præcipe directing Clerk to issue execution for \$2000 etc. and filed herein April 11, 1931 and for so much of the judgment not appealed from.

2. Plaintiff's Order to show cause why Marshal's return to the writ issued April 11, 1931 should not be corrected and protest to defendant's further designation of record.

3. Order denying motion, predicated upon motion for an order to show cause filed herein on May 26th 1931, dated June 1st 1931.

4. Plaintiff's motion for an order to show cause dated June 9th 1931 why defendant's further designation to embrace Marshal's return of writ of execution for
50 \$2000.00 should not be stricken from the files or Marshal's return corrected.

5. Order to show cause why clerk's entry should not be stricken from the permanent files, dated June 9th 1931.

6. Order denying order to show cause why the clerk's entry should not be stricken from the files, dated June 19th A. D. 1931.

7. Letter dated April 29, 1931, addressed by the plaintiff to the Clerk of the Court, enclosing plaintiff's motion for an order to show cause and protest to defendant's additional designation of —, etc., filed herein.

8. Letter dated May 5, 1931, from the Clerk of the Court to the plaintiff stating motion for an order to show cause has not been filed.

9. Letter from the Clerk directed to plaintiff under date of April 16, 1931, in the matter of Court fees deposited with Clerk showing a balance due plaintiff on that date \$109.54 and in addition thereto \$124.05 and the amount held by him until the conclusion of the case when a refund will be made of \$124.05 and showing the amount of \$233.59 having been paid to the Clerk as fees in this case.

10. Order filed on June 18th 1931, quashing the writ of execution dated June 1, 1931.

Memorandum.

June 30, 1931.—\$10.00 deposited by Plff.

52

Assignments of Error.

Filed July 20, 1931.

* * * * *

The Court erred as follows:

(1) In granting defendant's motion to quash writ of fieri facias issued on, to wit, June 1, 1931.

(2) In denying plaintiff's right to witness fees and traveling expenses as part of the court costs in this case.

(3) In not vacating the return of the U. S. Marshal to the writ of fieri facias first issued in this cause.

(4) In denying plaintiff's motion to correct the erroneous return of the U. S. Marshal.

(5) In not granting plaintiff's motion for an order to show cause, directed to the U. S. Marshal, Clerk and defendant, why the erroneous return of the U. S. Marshal should not be vacated and corrected to show that the præcipe for the writ of fieri facias ordered the writ to issue only for so much of the judgment as was not appealed from.

And for other reasons apparent on the face of the record.

LILLIAN CLAWANS,
By F. D. MASUCCI,
Attorney for Plaintiff.

Received a copy of the Assignment of Errors this 20th day of July, 1931.

P. H. MARSHALL,
Of Counsel for Deft.

53

Further Designation of Record.

Filed July 20, 1931.

* * * * *

The Clerk of the Court, in preparing the record for appeal to the Court of Appeals in this case, in addition to the

portions heretofore designated, will also include therein the following:

(1) Assignments of Error filed herein on the 20th day of July, 1931.

(2) Further Designation of record, filed herein on, to wit, June 29, 1931.

(3) This Further Designation of Record.

LILLIAN CLAWANS,
By F. D. MASUCCI,
Attorney for Plaintiff.

Received a copy of the Further Designation of record this 20th of July, 1931.

P. H. MARSHALL,
Of Counsel for Deft.

54 Supreme Court of the District of Columbia.

UNITED STATES, OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 53, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 69784 at Law, wherein Lillian Clawans, trading under the name of Adding & Calculating Company, is Plaintiff and Betty Way Carnduff is Defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of July, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5454. Lillian Clawans, trading, &c., appellant, vs. Betty Way Carnduff. Court of Appeals, District of Columbia. Filed Jul. 22, 1931. Henry W. Hodges, Clerk.

23 1931

In The Court ~~of Appeals of~~
The District of Columbia

APRIL TERM, 1931

No. 5454.

LILLIAN CLAWANS, APPELLANT,
Trading under the name
of Adding and Calculating
Company,

vs.

BETTY WAY CARNDUFF, APPELLEE.

BRIEF FOR APPELLANT.

LILLIAN CLAWANS,
F. D. MASUCCI,
Attorneys for Appellant.

In The Court of Appeals of The District of Columbia

APRIL TERM 1931

NUMBER 5454

LILLIAN CLAWANS, Trading
under the name of Adding
and Calculating Company,
Appellant,

vs.

BETTY WAY CARNDUFF,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

There are two appeals in this case. The first from a final order amending a judgment by striking therefrom the words "with interest from September 25, 1924", and the second from a final order quashing a writ of fieri facias issued on the judgment for court costs.

FIRST APPEAL.

Plaintiff filed her action at law to recover the sum of \$2000.00 with interest from September 25, 1924, for money loaned the defendant. After issue joined, the case came on for trial before Mr. Justice Cox and a jury. The plaintiff offered testimony in support of her declaration, and the defendant offered certain testimony. At the close of the case plaintiff moved the court to instruct the jury in her favor.

The Court granted this motion, and the jury returned a verdict in favor of plaintiff, with interest from September 25, 1924.

Defendant filed a motion for a new trial on the ground that the Court erred in directing a verdict for the plaintiff. This motion was denied by the Court in a Memorandum Opinion filed February 11, 1931, but the Clerk of the Court was directed to make an entry to show the "verdict merely for \$2000.00." (R. p. 9)

On the trial of the case, the Court was of opinion that plaintiff was entitled to interest under Section 1184 of the Code. In disposing of the motion for a new trial, the Court ruled that this "is a case in which interest could properly be awarded only by a finding of the jury". The plaintiff noted an exception to the order of the Court" amending the directed verdict of October 10, 1930, by striking out the words "with interest from September 25, 1924."

Assignments of Error.

(FIRST APPEAL)

The Court erred:

1. In its order of February 16th 1931, amending the directed verdict returned herein October 10, 1930, by striking out the interest named therein, and in lieu thereof inserting interest to run from the date of said order amending said verdict.

2. In interpreting Section 1184 of the Code of Laws of the District of Columbia in holding:

- (a) that same is not applicable to this case, and

- (b) that the \$2000.00 loan which defendant promised and agreed to repay in thirty days does not bear interest from the date said loan became due and payable;

3. In its order that the Clerk of Court made a

misprison in entering of record herein the directed verdict;

4. In amending directed verdict by striking out the interest claimed in the Declaration, after having granted plaintiff's prayer No. 1 for a directed verdict, and after having given the jury, plaintiff and her counsel to understand that interest would be computed by the Clerk of Court from date of defendant's default in the payment of the \$2000.00 loan. In support of this assigned error plaintiff refers the Court to the affidavits of the respective jurors who returned the directed verdict. (R. pp. 27 to 33)

5. In considering amending and modifying said verdict.

6. In other respects apparent of record.

(SECOND APPEAL)

The court further erred as follows:

1. In granting defendant's motion to quash writ of fieri facias issued on, to wit, June 1, 1931.

2. In denying plaintiff's right to witness fees and travelling expenses as part of the court costs in this case.

3. In not vacating the return of the U. S. Marshal to the writ of fieri facias first issued in this cause.

4. In denying plaintiff's motion to correct the erroneous return of the U. S. Marshal.

5. In not granting plaintiff's motion for an order to show cause, directed to the U. S. Marshal, Clerk and defendant, why the erroneous return of the U. S. Marshal should not be vacated and cor-

rected to show that the praecipe for the writ of fieri facias ordered the writ to issue only for so much of the judgment as was not appealed from.

And for other reasons apparent on the fact of the record.

Argument and Authorities

The principal question presented on the first appeal is whether appellant was entitled to recover interest at the legal rate, for a period of six year, under Section 1184 of the Code.

On September 25, 1924, the plaintiff issued her check for \$2,000.00, payable to the appellee; and on the following day the appellee issued her receipt, wherein she acknowledged a loan for thirty days. (R. pp. 6 and 7)

On the trial of the case, after plaintiff had established her case, the defendant offered certain parol evidence to contradict the written documents. This evidence was stricken by the Court, and no evidence remained in the case on behalf of the defendant.

In this state of the record the plaintiff moved for an instructed verdict, which was granted, and a verdict in favor of plaintiff was returned by the jury. The verdict, as entered by the Clerk, appears on page 6 of the Record.

The reason for amending this verdict appears in the Court's memorandum opinion. (R. pp. 6 and 7)

Appellant contends that she was entitled to interest under Section 1184 of the Code. This section reads as follows:

"In an action in the Supreme Court of the District to recover a liquidated debt

on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid."

The above-quoted section has been considered and construed by this Court in the case of *Metzger v. Metzger*, 35 App. D. C. 389.

That was a suit upon a promissory note. The jury returned a verdict for the principal sum, but omitted interest. The trial court reformed the verdict so as to include interest. This action of the court was reversed. However, the Court said:

"We do not mean by this rule to rule that, in a case where no question is made by either the pleadings or evidence as to the payment of interest, the court would not be authorized under the provisions of said Section 1184, to direct the assessment of interest. In such a situation the finding of the jury would, under the statute, automatically carry interest."

In the case at bar the action was to recover a liquidated debt "on which interest is payable by" * * * "law or usage", and plaintiff was entitled to interest on the principal sum represented by the written instruments in evidence, from the date of maturity of the debt.

See,

Concordia Ins. Co. v. School District, 282 U. S. 545, 75 Law Ed., following

Miller v. Robertson, 266 U. S. 243, 69 Law Ed. 265.

There was an implied contract to pay interest.

Spalding v. Mason, 161 U. S. 375, 396, 40 Law Ed. 738.

The claim for interest was in issue under the pleadings, and it would have been error to have directed a verdict for only a part of that which was in issue.

If the trial court had been of opinion that plaintiff, under the section of the Code above quoted, was not automatically entitled to interest, then there should have been no directed verdict, but the issue should have been submitted to the jury.

In any event, there was no authority for reformation of the verdict by the Court. It sufficiently appears by the record that there was no misprison on the part of the clerk.

See the Court's opinion on motion for a new trial. (R. pp. 6 to 9)

1. Parties to an action may consent to a departure from the usual course of trial or may waive irregularities therein. Thus the losing litigant cannot complain of an irregularity in the trial of which he had notice and to which he consented previous to the verdict.

38 Corpus Juris 1325 Sec. P and cases therein cited.

Assuming, although not admitting, that the Court did err in directing the verdict with interest to be assessed by the clerk, still defendant having advised the Court that such was the proper procedure and having consented thereto, (R. pp. 17 and 18) cannot now and should not have been heard to complain about said alleged irregularity.

2. Defendant's motion was for a new trial and not for a modification or reformation of the verdict nor was the question of interest raised by said motion. (R. p. 6).

The question of modifying said verdict or the question of interest was not presented for the Court's consideration and neither questions were argued by counsel either orally or in their briefs, and it is, therefore, submitted that the Court was without power to either amend said verdict or consider the question of interest on the motion as presented and argued.

The effect of the Court's ruling was to deprive plaintiff of the benefit of interest amounting to \$724.00 without even the benefit of an opportunity of being heard on the question of amendment of the judgment or on the question of the interest.

Second Appeal.

On April 11, 1931, appellant filed a praecipe to the Clerk to issue execution for \$2000.00 and costs to date, "and leave open the amount of interest named by directed verdict until final determination of the Court of Appeals of plaintiff's appeal from so much of the order amending the directed verdict allowing interest from date of directed verdict." (R. p. 35)

Thereafter, on May 21, 1931, the plaintiff filed a certificate of plaintiff's witnesses, amounting to \$984.44. (Docket Entries, R. p. 25)

On May 26, 1931, plaintiff filed a petition for rule to show cause why docket entries return on writ of fieri facias should not be corrected. (R. pp. 33 and 34)

On June 1, 1931, at plaintiff's direction, a writ of fieri facias for witness fees was issued. (Docket Entries, R. p. 25)

On June 9, 1931, a motion was filed by plaintiff to correct return of Marshal. (R. p. 36)

On June 9, 1931, a rule was issued requiring defendant to show cause why entry of "Judgment satisfied in full", should not be stricken from the Record. (R. p. 37)

Thereafter, on June 10, 1931, the defendant filed a motion to quash writ of execution issued June 1, 1931.

This motion was granted by the Court on June 18, 1931, (R. p. 38)

On June 19, 1931, plaintiff's rule to show cause was discharged. (See Memorandum opinion of Judge Cox, R. p. 38)

On June 30, 1931, plaintiff noted an appeal from the order of the Court, quashing the writ of fieri facias issued June 1, 1931.

Argument and Authorities

Appellant was entitled to recover witness fees, to be taxed by the Clerk pursuant to Section 1114 of the D. C. Code.

The statute does not specify the procedure incident to the taxation of such fees, and no time is prescribed for the filing by Counsel of a "certificate of attendance". The certificate of Counsel had not been filed when the first writ of fieri facias was issued. The order for the issuance of the writ was very specific. (R. p. 35)

The U. S. Marshal had no authority to do anything more than collect the judgment for \$2,000.00, with costs to date of writ, April 11, 1931. Insofar as he attempted to satisfy the judgment "in full", he exceeded his authority. It was within the power of the Court to correct the records of the Court to show that the amount paid by the defendant to the Marshal was only in part settlement, and did not include witness fees. The rule

to show cause why the entry "Judgment satisfied in full" should not be stricken from the files of the Court was discharged. (R. p. 37)

The entry above referred to deprived the appellant of her appeal theretofore perfected, and further deprived her of witnesses' fees. Appellant's petition to strike said entry should have been granted.

The general rule is that a party who enforces a judgment cannot afterwards maintain an appeal. But this rule is subject to an exception in cases "where appellant is shown to be absolutely entitled to the sum collected and that reversal will not affect his right to it". This exception is supported by many Federal cases, the latest being the case of *Armstrong v. Lone Star Refining Co.*, 20 Fed. (2d) 626, citing *Embry v. Palmer*, 107 U. S. 3, and *Reynes v. Dumont*, 130 U. S. 354.

The subject is discussed in 3 *Corpus Juris* at p. 682, Sections 556 and 557.

In the case at bar, it is undisputed that appellant was entitled to collect the principal sum. The only question on appeal is whether, in addition to said sum, she is entitled to interest and costs. The issuance of the writ of *fi. fa.* on the judgment for Two Thousand Dollars, under the authorities cited, does not affect her right to prosecute her appeal for the items in dispute.

Respectfully submitted,

LILLIAN CLAWANS,
F. D. MASUCCI,
Attorneys for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAR 28 1932

IN THE *Henry W. Hodges*
CLERK

Court of Appeals, District of Columbia

APRIL TERM, 1932.

No. 5454.

LILLIAN CLAWANS, *Appellant*, Trading under the name
of Adding and Calculating Company,

VS.

BETTY WAY CARNDUFF, *Appellee*.

BRIEF FOR APPELLEE.

ROGER J. WHITEFORD,
P. H. MARSHALL,
Attorneys for Appellee.

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IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1932.

No. 5454.

LILLIAN CLAWANS, *Appellant*, Trading under the name
of Adding and Calculating Company,

vs.

BETTY WAY CARNDUFF, *Appellee*.

BRIEF FOR APPELLEE.

STATEMENT OF CASE

The appellee has filed: 1. A motion to dismiss this appeal; 2. A motion to strike certain portions of the printed record. The Court has postponed action upon these motions until the hearing upon the merits.

For these reasons, and because we regard the motions as well grounded, we shall discuss the matters involved in the motions at the outset.

The record contains no bill of exceptions. The trial Court refused to sign the bill of exceptions submitted by appellant, stating in the order that said bill "can not be signed by the Court, that it likewise can not be made of record in this cause." (R. 39.)

Paragraph 1 of rule 15 of this Court requires that the transcript of record be filed with the Clerk of this Court within sixty days from the time the appeal is perfected in a case in which there is no bill of exceptions.

Appellant perfected her appeal April 7, 1931 (R. 13), while the transcript of record herein was filed in this Court July 22, 1931 (R. 43).

No application was made for an extension of time within which to file the transcript of record, nor any order extending the time therefor. That such extension must be granted, if at all, before the expiration of the period allowed for filing such transcript, and that after the expiration of such period, no extension can be granted, see *D. C. vs. Roth*, 18 App. D. C. 547.

There being no bill of exceptions, and nothing whatever before this Court to enlighten the Court as to the evidence introduced in the trial of this case upon its merits, we submit that all assignments of error dealing with the action of the trial Court in amending the verdict directed at the instance of plaintiff are without sufficient foundation to be considered on appeal. It is impossible for this Court to determine what evidence was before the trial Court which would have required that Court to submit to the jury the matter of interest. For example, how can this Court determine from the record whether or not a tender was made, or when, if at all; or what other facts may have appeared in the testimony justifying the action

of the Trial Judge? Where the evidence is not included in the record on appeal, it will be assumed that it supported and furnished a proper basis for the decree appealed from. *Avery vs. Vernon*, 59 App. D. C. 284. All that the transcript of record shows is that on October 10, 1930, the jury found in favor of the plaintiff in the sum of Two Thousand Dollars with interest from September 25, 1924 (R. 6), and that on February 16, 1931, the Court struck from said verdict the words "with interest from September 25, 1924" because of misprision of the clerk in recording said verdict (R. 9). Why the Court so amended said verdict does not appear from any proper transcript of record, as we shall hereafter attempt to show, and in the absence of the testimony upon which the Court acted, it must be assumed in this Court that the action of the Trial Judge was correct, rather than erroneous.

Appellant attempts to supply the lack of a bill of exceptions by including in the transcript various memorandum opinions of the trial Justice, and many papers filed by her or on her behalf, of a purely *ex parte* character, and purporting to recite what occurred at the trial, what was said or thought by the Judge, and her own statements as to matters which, if material at all, could only be considered by this Court when embodied in a bill of exceptions, signed by the Justice presiding at the trial, and ordered by him to be made a part of the record, in conformity with the rules of Court and the established practice in this jurisdiction.

MEMORANDUM OPINIONS NOT PART OF THE RECORD.

In *Anderson vs. Sands*, 39 App. D. C., at page 534, this Court said: "We may call attention to paragraph (f) of section 1 of rule 5 in regard to incorporating the opinion of the Trial Court in the transcript. The opinion of the Court is not a part of the record of a case, and is only made so by the provisions of the rule which requires that where a written opinion of the Court below with respect to the judgment, decree or order appealed from shall be filed, such opinion shall be incorporated in such transcript." In the case of *England vs. Gebhardt*, 112 U. S. 502, the Court said (p. 506), "Neither is the opinion of the Court a part of the record. Our rule 8, section 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or on an appeal to this Court, but that of itself does not make it a part of the record below."

In *Johnson vs. United States*, 160 U. S. 546, one of the principal questions before the Supreme Court was as to the citizenship of the claimant. The Court said (pp. 552-553), "It was further insisted in the argument that the claimant had taken out his first papers at the time of the depredation and therefore that when he took out his final papers, citizenship related back and he was entitled for all the benefits of the Act to claim the privileges of citizenship from the date of his first papers. But there is nothing in his petition to show when he took them out, and therefore the contention, if it had any foundation in law, has none in fact. It is true mention is made in the opinion of the Court of Claims of the time of

taking out his first papers, but we can not act upon any such statement, but must be governed by the averments of the petition." In *Garth vs. Arnold*, 115 Fed. 468, the Court said (p. 472), "No bill of exceptions was filed to bring any of the testimony upon the record, and, so far as we are advised, no exceptions were taken to the admission of any testimony. All the knowledge that this Court has concerning the testimony is derived from certain excerpts therefrom found in the opinion of the Trial Judge; but that does not make the testimony a part of the record, or present for review the question whether the testimony was competent, because the opinion of the Court not being embodied in a bill of exceptions forms no part of the record."

In *Albany Paper Company vs. John Hoberg Company*, 109 Fed. 589, the Court said (p. 591), "The remaining specifications are each to the effect that the Court erred in holding and adjudging as stated; but outside of the opinion of the Court, there is in the record nothing to show that the Court so held or adjudged, and we have decided repeatedly that error may not be predicated of the Court's opinion, or reasons for a ruling."

In *North American Loan and Trust Company vs. Colonial and U. S. Mortgage Company*, 83 Fed. 796, it was expressly held that a memorandum opinion filed by the Trial Judge is no part of the record in the case, and assignments of error based thereon, and not supported by exceptions properly taken and preserved in the record, will not be considered by the Circuit Court of Appeals. This was held to be the law despite the rules of Court which required the Clerk of the lower Court to certify the opinion to the Circuit Court, together with the record.

In *Steuart vs. Cooley*, 23 Minn. 351, the opinion of the lower Court recited that it was admitted on the trial that a certain statement in the petition was merely a formal allegation, and that the action was in fact one for false imprisonment. The Court said, "We have no reason to doubt that such was the understanding of the Court below, and the basis of its decision. We can only regret that the admission was not made a matter of record in the cause at the time, in such manner as to have operated as an amendment of the complaint in conformity with the admission. Inasmuch as this was not done, and as counsel for the plaintiff denies the admission in this Court, and insists upon the determination of the case upon the record before us, we can only look to the complaint and demurrer and not to the opinion, to ascertain whether a cause of action is stated or not."

The general rule is thus stated in 2 R. C. L. 129: "As a general rule the written opinion of the trial Court, as distinguished from its judgment, is not a part of the judgment roll proper. Accordingly the opinion of the trial Court in granting a motion for a new trial is ordinarily no part of the record, and can not be resorted to for the purpose of adding to the record sought to be reviewed, unless, of course, the statute in a particular jurisdiction provides otherwise."

"The rules of the Supreme Court and of the several Circuit Courts of Appeal require the clerk of the Court below, in all cases, to annex to and transmit with the record a copy of the opinion or opinions filed in the case (Supreme Court rule No. 8, paragraph 2). These rules do not make such opinions part of the record." (4 C. J. 105.)

OTHER PAPERS NOT PART OF RECORD.

We therefore submit that this Court will not resort for information to the memorandum opinions included in the transcript of record, and certainly it will not resort to *ex parte* statements in papers filed by appellant, wherein she sets forth matters of fact which, if material, should have been embodied in a bill of exceptions and thus presented for review. In this connection, we ask the attention of the Court to the so-called "Stenographic Report" beginning on page 16, and ending on page 19 of the record.

Instead of incorporating in a bill of exceptions the matters therein contained, appellant filed this paper *ex parte*. It purports to be certified by one Fred H. Monk. Certainly no practice justifies the inclusion in a transcript of record and the consideration thereof by an Appellate Court of a paper injected into the case in this manner, and certified by an unknown, instead of the certificate and order of the trial Justice demanded with reference to a bill of exceptions.

At this point, and for the purpose of anticipating a possible question from this Honorable Court as to why an effort was not made in the Court below to exclude from the transcript various papers contained therein, and which we contend are not proper to be considered by this Court, we respectfully ask attention to the following facts: Appellant's original designation of record, filed April 23, 1931, shows service thereof upon counsel for appellee (R. 14 and 15). The Stenographic Report above mentioned, filed April 24, 1931, shows no such service. The so-called exceptions filed by appellant April 6, 1931 (R. 10), show no such service. Plaintiff's additional designation of record, filed April 24, 1931 (R. 27), shows

no such service, and the affidavits of jurors, filed April 23, 1931 (R. 27-34 inc.), show no such service. Appellant's further designation of record filed May 26, 1931 (R. 35), shows no such service, nor does her further designation of record filed June 29, 1931. The record further discloses that on July 20, 1931, appellant filed a further designation of record, copy of which was then served on counsel for appellee (R. 43), and which on that date first informed such counsel of the various designations and papers theretofore filed in this case without notice to appellee, and that on July 22, 1931, the second day following the notice aforesaid, this transcript was filed in this Court, without affording to counsel for appellee a sufficient opportunity to examine into the matters so called to their attention on the 20th of July, and without even giving them the five days allowed by paragraph 1 (g) of rule 5 of this Court within which to file a counter designation.

In *Wertz vs. Wertz*, 20 App. D. C. 98, this Court held that an abstract of testimony included in the transcript as the testimony in the case was not a part of the record, said abstract having been prepared by the losing party, and copy thereof served on opposing counsel, and no action concerning the same having been taken by opposing counsel. This Court held said paper to be an unauthorized abstract or digest of the testimony filed in the Court below after the cause had been decided, and quoted the opinion of Chief Justice Waite, in *R. R. Co. vs. Schutte*, 100 U. S. 644, as follows: "While we desire to encourage in every proper way all attempts made in good faith to exclude immaterial matter from the transcripts brought here on appeals or writs of error, it will not

do to permit the appellant or the plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the Court.”

We submit that in the instant case this is just what appellant has done, namely, she has made up a transcript of record to suit herself, without any regard to the wishes of counsel for appellee; without any adequate notice as to what she had directed to be included in said transcript, and in total disregard of the rules and of the established practice of this Court and of the Court below.

In *Vincent vs. U. S.*, 59 App. D. C. 194, this Court said, “No bill of exceptions was taken. The record before us does not contain the evidence adduced at the trial, the charge of the Court, nor disclose that any exceptions were taken. In the absence of any exceptions properly appearing in the record nothing is presented for this Court to review.”

While appellant filed herein an *ex parte* paper, in which she purports to set forth exceptions (R. 10), the authorities which we have cited certainly sustain our contention that this paper is no part of the record, and cannot be used as a substitute for a bill of exceptions in proper form.

In *B. & P. R. Co. vs. Trustees of Sixth Presbyterian Church*, 91 U. S. 127, affidavits of counsel and of two jurors as to certain evidence introduced at an inquisition were included in the transcript. The Supreme Court said (p. 130), “Neither depositions nor affidavits, though appearing in the transcript of a common law Court of errors, can ever be regarded as part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a

demurrer to the evidence, or are exhibited in a bill of exceptions. Matters of parole evidence in such a case can never be made a part of the record so as to become re-examinable in a Court of errors unless it be in one of four ways: (1) by an agreed statement of facts; (2) by a bill of exceptions; (3) by a special verdict; (4) by a demurrer to the evidence; which latter mode is seldom or ever adopted in modern practice." The principles announced in the foregoing decision are conclusive against the efforts of appellant to have questions reviewed on appeal to this Court when the facts are made to appear only by affidavits or sworn statements contained in papers filed on her behalf, or by reference to opinions filed by the Court below.

In the same opinion the Supreme Court further said, "When a party is dissatisfied with the decision of his cause in an inferior Court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the question of law to be reviewed, and put the facts on record for the information of the appellate tribunal; and, if he omits to do so in any of the methods known in the practice of Courts of errors, he must be content to abide by the consequences of his neglect. Evidence, whether written or oral, and whether given to the Court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial, and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it can not be reviewed in a Court of error exercising jurisdiction according to the course of the common law."

See also *Redfield, Executor, vs. Iron Company*, 110 U. S. 174; *Lehnen vs. Dickson*, 148 U. S. 71.

ASSIGNMENTS OF ERROR, FIRST APPEAL.

We submit that the foregoing authorities are conclusive against the consideration by this Court of the assignments of error with reference to the first appeal, as the same appear on page 13 of the record. There being no bill of exceptions, and no papers included in the record proper to be considered by this Court, there is nothing before this Court from which it can ascertain the facts, or what evidence there was, or the reasons motivating the trial Court in making the order referred to in the first exception, which order appears in the record at page 9. The order is properly a part of the record, but this Court can not determine why said order was made without resorting for information to matters which, while contained in the transcript of record, are properly no part thereof.

We submit that the foregoing applies equally to each of the first five assignments of error on the first appeal. It is especially obvious in the fourth assignment, wherein attempt is made to inform this Court as to what the trial Court gave the jury, plaintiff and her counsel to understand, and in which assignment reference is made to *ex parte* affidavits of jurors filed without notice to counsel for appellee. It is difficult to understand the purpose for which these affidavits were filed, as they purport to show what the jury would have done had the Court not directed them to do otherwise, which seems hadly worthy of notice in this brief.

The so-called sixth assignment of error is entirely

too indefinite and insufficient to be considered under the rules and practice of this Court.

ASSIGNMENTS OF ERROR, SECOND APPEAL.

With reference to the first assignment of error on the second appeal, we ask the Court's attention to the fact that appellant has not seen fit to include in the transcript the motion to quash the writ of *feri facias* issued June 1, 1931. Therefore, this Court does not know the grounds for said motion, nor why it was granted.

The writ of *feri facias* itself appears in the transcript of record, pages 15 and 16, together with the return of the marshal thereon, which return showed satisfaction of the writ. The order for this writ, as filed with the Clerk, appears in the transcript at page 35. In said order appellant directed the clerk to issue execution for Two Thousand Dollars and costs to date (April 11, 1931). The order also contains the following: "And leave open the amount of interest named by directed verdict until the final determination by the Court of Appeals of plaintiff's appeal from so much of the order amending the directed verdict allowing interest only from date of directed verdict." This paper was filed with the Clerk, and neither appellee nor her counsel had any knowledge of this attempt by appellant to leave open any question concerning interest. We submit that she could not give any such order to the clerk, and that he could not leave any matter open. When demand was made by the marshal under this writ, said demand was satisfied, and the writ returned by the marshal "Satisfied as to judgment, demand fee and costs in full April 11, 1931" (R. 16).

Assignment No. 2 is concerned with the alleged denial of plaintiff's right to witness fees and traveling expenses. Nothing in the record discloses any such denial, or that she was entitled to witness fees or traveling expenses; and if she was so entitled, manifestly it was due to her fault or neglect that they were not computed by the clerk and included in the execution.

She made no motion to retax the costs, nor is there anything before this Court, as part of the record proper to be considered on this appeal, disclosing any error in the premises.

We further suggest that a party entitled to an execution can not lawfully collect a judgment a little bit at a time, and thereby put the judgment debtor to increased costs and annoyance; and certainly appellant, in seeking to justify such action, must place before this Court in an appropriate way such matters of fact as would justify her action.

The third assignment, second appeal, is without merit, for the manifest reason that the return of the marshal to the writ of *feri facias* was correct, and was the only return he could make, and the same observation is true concerning assignments numbers 4 and 5. As to none of the matters assigned as error are any facts properly brought before this Court from which facts it can determine that any error was committed. It certainly can not so determine from *ex parte* papers filed on behalf of appellant.

With further reference to the fifth assignment, appellant has included in the transcript (R. 33), a petition filed by her May 26, 1931, for an order to show cause against the United States Marshal and the clerk why the return upon said writ of *feri facias* should

not be corrected. She also includes in the transcript (R. 36) a motion for a rule to show cause filed June 9, 1931, against counsel for appellee, and a rule issued thereon requiring said counsel to show cause why "written notice to the clerk of this Court to enter in the designation of record on appeal the following entry 'Judgment satisfied in Full' should not be stricken from the files of the Court." (R. 37.) This rule was discharged by order of Court of June 19, 1931, (R. 38) from which order it appears that a return was filed by respondents and the matter argued by counsel. The return is not included in the transcript.

Under these circumstances, we respectfully ask this Court how it can determine that the action of the Court below was wrong.

In passing, it is obvious that the so-called "written notice to the clerk of this Court to enter in the designation of record on appeal the following entry 'Judgment satisfied in Full' " has no reference to anything other than the direction to the clerk included in defendant's additional designation of record appearing on page 16 of the transcript, in which the clerk was directed to include in the transcript "writ of *facias* issued April 11, 1931, by order of plaintiff, and returned satisfied in full as to principal and costs." In other words, counsel did not direct the clerk to make any entry, but merely to include in the transcript the entry of the return of the marshal as the same appears on page 16 of the transcript, which return had been made by the marshal, and was of record, twelve days before defendant's additional designation of record was filed.

In conclusion, our position is that this Court can not review the action of the trial Court in respect to the various matters assigned as error by appellant, because there is no bill of exceptions in this case, and no information before the Court to which it may properly resort for the matters of fact upon which the trial Court based its rulings in the matters specifically assigned as error by appellant.

We also submit that the record was not filed within the time allowed by the rules of this Court in a case in which there is no bill of exceptions, and that if appellant has sustained any loss of which she would have a right to complain in this Court (which we do not admit) the fault is hers, because she has failed utterly "to raise the questions of law to be reviewed, and to put the facts on record for the information of the appellate tribunal * * *" and "must be content to abide by the consequences of his own neglect". *B. & P. R. Co. vs. Trustees of Sixth Presbyterian Church*, 91 U. S. 127.

Respectfully submitted,

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